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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

SolarCity Corporation,

Plaintiff,

vs.

Salt River Project Agricultural Improvement
and Power District,

Defendant.

Case No. 2:15-CV-00374-DLR

**THE DISTRICT'S MOTION AND
MEMORANDUM TO PRECLUDE
MARK FULMER FROM OFFERING
AT TRIAL ANY EXPERT OPINION
REGARDING THE "VALUE OF
SOLAR DG" TO THE DISTRICT OR
ANY EXPERT OPINION
REGARDING THE E-27 RATE'S
DEMAND CHARGE**

ORAL ARGUMENT REQUESTED

MOTION

Defendant Salt River Project Agricultural Improvement and Power District (the “District”) moves the Court to preclude Plaintiff SolarCity Corporation’s proposed expert, Mr. Mark Fulmer, from offering the opinions contained in his report.

MEMORANDUM¹

INTRODUCTION

Plaintiff SolarCity Corporation intends to present opinion testimony under Federal Rule of Evidence 702 from Mark Fulmer regarding (1) Mr. Fulmer’s “estimate” of the “potential” value of rooftop solar to the District; and (2) Mr. Fulmer’s “suspicion”—based on his “experience as an electric consumer” and a “half-dozen” customer declarations—that the demand charge component of the E-27 rate is complex and that as a result, consumers will not modify their behavior in response to the rate. Neither opinion is reliable and Mr. Fulmer’s value of solar estimate is also irrelevant. The Court should not permit him to testify at trial.

Mr. Fulmer’s value of solar estimate cannot provide data sufficiently reliable to be admitted at trial because (1) “significant methodological gaps” remain in estimating the value of rooftop solar to utilities; (2) as SolarCity and Mr. Fulmer concede, value of solar estimates depend on, and are sensitive to, multiple external variables, but Mr. Fulmer failed to control for any of those variables and also did not perform a sensitivity analysis; (3) a substantial portion of Mr. Fulmer’s estimated value of solar is, by his own admission, not based on any data specific to the District, but instead cherry-picked from other solar-industry funded studies for other utilities; and (4) Mr. Fulmer, a consultant with no relevant academic or professional background, who is not a grid engineer, and who has never subjected his value of solar estimates to peer review, lacks sufficient qualifications to opine on the value of rooftop solar to the District. These multiple failures of Mr. Fulmer’s value

¹ Pursuant to Local Rule 7.2, prior to filing its motion, the District met and conferred with SolarCity on September 14, 2016 in an effort to resolve the issues raised herein. The meet-and-confer process did not resolve them.

1 of solar estimate, coupled with the dubious reliability of value of solar estimates generally,
2 means that Mr. Fulmer's opinion lacks a "reliable basis in the knowledge and experience in
3 the relevant discipline," *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999), and
4 therefore must be excluded.

5 Mr. Fulmer's value of solar estimate is also irrelevant. SolarCity challenges the
6 District's retail electricity rates as applied to rooftop solar customers. Value of solar
7 estimates, like those Mr. Fulmer attempted to perform, purport to measure *future* avoided
8 costs. Utilities do not set their rates based on costs that they hope to avoid in the future.
9 Thus, Mr. Fulmer's value of solar estimate lacks a "valid . . . connection to the pertinent
10 inquiry," *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993), and is
11 inadmissible.

12 Mr. Fulmer's opinion regarding the E-27 rate's demand charge fares no better. Mr.
13 Fulmer has no experience as a regulator of a public utility, or working in pricing at a utility.
14 He is not an economist. He did no empirical work in forming his opinion, he spoke to no
15 customers who are actually on the rate, he has never been on a residential demand charge
16 himself, he failed to consider or even look for evidence that directly contradicted his
17 opinions, and he admits he has no expertise in customer marketing or behavior. Yet, he still
18 seeks to offer his "suspicion" that the E-27 demand charge is too complicated for customers
19 in the District's service area to understand (even though he says that he understands it), and
20 that therefore the price signal embedded in the rate is unlikely to generate the desired
21 response. Mr. Fulmer is entitled to his personal views, but this opinion is little more than
22 "an opinion broached by a purported expert" and *not* an "opinion informed by the witness's
23 expertise," and is therefore inadmissible. *United States v. Hall*, 93 F.3d 1337, 1343 (7th
24 Cir. 1996).

BACKGROUND

I. Value of Solar

As Dr. Susan Tierney² explains in her report, in recent years, many utilities and regulators have begun to re-evaluate the sustainability of retail net metering. In response, rooftop solar industry advocates have attempted to quantify the so-called value of rooftop solar to a utility, typically in order to justify continuation of a subsidy from the utility to rooftop solar customers. Ex. A at ¶ 130. “[V]alue-of-solar studies typically seek to estimate the net value (positive or negative) of solar installations by accounting for both the costs and benefits associated with distributed solar.” *Id.* ¶ 133. To date, however, “[n]o study [has] comprehensively evaluated the benefits and costs” of rooftop solar. *See* Ex. B at 4 (eLab, “A Review of Solar PV Benefit and Cost Studies”). Thus, as Mr. Fulmer concedes, value of solar estimates typically have not been used by the ratemaking bodies of utilities to inform rate design for rooftop solar customers. Ex. C at 14:21-15:17 (Videotaped Deposition of Mark Fulmer, Aug. 19, 2016).

In part, this reluctance on the part of regulators to rely on value of solar estimates stems from the absence of consensus surrounding the proper methodology—and the lack of sufficiently granular data—to calculate the benefits and costs of rooftop solar. Mr. Fulmer, in forming his opinion, relied heavily on a meta-study of value of solar estimates, *id.* at 29:16-24, but that meta-study itself observed that “significant methodological gaps” exist in performing value of solar estimates. Ex. B at 5. Mr. Fulmer readily acknowledges that these “gaps” exist. Ex. C at 112:13-113:25. As a result, and as Mr. Fulmer testified, “the values [among different studies] have ranged considerably due to various factors.” *Id.* at 116:19-20. No value of solar estimate has been subject to peer review to resolve these and other methodological discrepancies discussed below.

² Unlike Mr. Fulmer, Dr. Tierney has published on the value of solar methodology, has worked as a regulator of a public utility, and has overseen ratemaking and resource planning for public utilities. *See* Ex. A at ¶¶ 2-8 (Expert Report of Susan F. Tierney, Ph.D., July 1, 2016).

1 In the normal course of its business, SolarCity recognizes the inherent unreliability of
 2 value of solar estimates. SolarCity admits that such estimates are “necessarily simplified
 3 given uncertainty about future conditions that are exogenous variables in the models.” Ex.
 4 D (SOLARCITY, *Distributed Energy Resources in Nevada*, available at
 5 www.solarcity.com/gridx (last visited Sept. 13, 2016). SolarCity’s co-founder testified that
 6 the value of solar is a “complicated area of grid systems engineering” that is currently part
 7 of an “active discussion” in the industry. Ex. E at 73:19-74:3; 74:21-75:7 (Videotaped
 8 Deposition of Peter Rive, Apr. 8, 2016). And SolarCity’s corporate designee, Ryan Hanley,
 9 testified that in setting the E-27 rate, he did not know how the District’s Board was
 10 “supposed to consider the value of rooftop solar, when [that value] depends on so many
 11 factors.” Ex. F at 91:12-18 (Videotaped 30(b)(6) Deposition of SolarCity Corporation by
 12 Ryan Hanley, May 18, 2016).

13 Mr. Fulmer agrees that the potential value of rooftop solar to the District is a
 14 “function of various variables.” Ex. C at 49:23-50:4. Yet, Mr. Fulmer did not control for
 15 any of these variables, by, for example, performing a regression analysis. *Id.* at 60:3-61:11.
 16 Mr. Fulmer also admits that an estimate of the value of solar is “sensitive to the inputs [he]
 17 select[s].” *Id.* at 216:23-217:4. But he did not perform a basic sensitivity analysis, *id.* at
 18 217:5-7; 281:4-20, even though multiple other studies that Mr. Fulmer looked at had done
 19 just that. *Id.* at 53:5-11. Mr. Fulmer did not do so because “[f]or the most part, I was asked
 20 to provide a value of solar study with a value,” *id.* at 51:22-52:21, and not for any analytical
 21 purpose.

22 In addition, more than 25 percent of the “value” that Mr. Fulmer estimates is based
 23 solely on “non-SRP analyses or studies.” Ex. G at 3 (Expert Report of Mark Fulmer
 24 [Corrected], Aug. 18, 2016). Most of these values were estimated as follows: Mr. Fulmer
 25 “glanced at” other value of solar estimates, “looked at their values and calculations,” and
 26 assumed that the District would obtain a value somewhere along the range of values in those
 27 studies. Ex. C at 236:15-18; 261:13-263:24 (“Because I believed there was something
 28

1 there, I didn't want to assume zero . . . So I just took a value that I thought—found to be
2 within the middle, if not closer to zero than the highest value from the meta study.”).

3 Mr. Fulmer also did not perform the location-specific, granular analysis in estimating
4 the value of solar that he acknowledges is “ideal.” *Id.* at 226:17-227:6. Location analysis is
5 important because the benefits and costs of rooftop solar vary significantly depending on the
6 location on the grid of rooftop solar installations. *See, e.g.,* Ex. H (ENERGY +
7 ENVIRONMENTAL ECONOMICS, *The Benefits and Costs of Net Energy Metering in New*
8 *York, Prepared for: New York State Energy Research and Development Authority and the*
9 *New York State Department of Public Service*, December 11, 2015; Ex. A at ¶ 142-144; Ex.
10 C at 16:13-23 (value of rooftop solar “is utility-specific. It’s location-specific.”). SolarCity
11 itself believes that “it is worthwhile to perform” a value of solar estimate “with location-
12 specific data and assumptions.” Ex. F at 12:17-13:12. Yet Mr. Fulmer did not even ask for
13 data on the location of rooftop solar installations in the District’s service area, and never
14 examined any such data in performing his estimate. Ex. C at 139:7-13.

15 Mr. Fulmer’s estimate also did not consider most of the costs utilities incur from
16 rooftop solar installations and administering net metering. *Id.* at 162:6-24; 269:24-270:17;
17 285:9-22. Mr. Fulmer admits that utilities incur incremental costs in serving rooftop solar
18 customers. Ex. G at 38. For example, Mr. Fulmer agrees that the District incurs integration
19 costs associated with rooftop solar. Ex. C at 266:6-8. Identifying these costs, however,
20 requires “a specific engineering study.” Ex. G at 38; Ex. C at 266:9-13. Mr. Fulmer never
21 conducted such a study because doing so “requires a special skill” that Mr. Fulmer does
22 “not have.” Ex. C at 266:22-267:2. Instead, Mr. Fulmer estimated integration costs based
23 exclusively on a three-year old study undertaken for a different utility because the firm that
24 performed the study “is a big firm, and they have some reputation.” *Id.* at 267:10-268:22.

25 Mr. Fulmer also failed to consider many of the other costs that the District incurs
26 from serving rooftop solar customers. For example, other value of solar estimates examine
27 administrative costs, interconnection costs, rebates/incentives, and decreased utility revenue
28 associated with rooftop solar installations. Ex. B at 19. Mr. Fulmer’s report did not even

1 consider these costs, let alone account for them. Ex. C at 162:6-24; 269:24-270:17; 285:9-
 2 22. While Mr. Fulmer suggests that his value of solar estimate should have informed the
 3 District Board's decision in setting the E-27 rate, he acknowledges that his estimate only
 4 measures potential future avoided costs. *Id.* at 58:5-59:20. In contrast, he agreed that
 5 ratemaking attempts, in meaningful part, to recover historical costs already incurred. *Id.*
 6 Neither Mr. Fulmer nor any representative of the solar industry produced a value of solar
 7 estimate for the District Board's consideration during the public ratemaking process, nor did
 8 they articulate the way in which such an estimate would have affected the E-27 rate design.

9 **II. Demand Charge**

10 Mr. Fulmer offers an opinion "on demand charges in general." Ex. C at 272:13-20.
 11 His opinion is that "he is not fond of demand charges" for residential customers because he
 12 sees them as unduly complex. *Id.* at 273:4-18.

13 Mr. Fulmer has never worked at a utility. *Id.* at 77:7-78:1. He has never set retail
 14 electricity rates for a utility. And he has never worked as a regulator of a public utility or
 15 otherwise served on a ratemaking body. Mr. Fulmer has never been on a residential demand
 16 charge himself and has no experience as an economist. *Id.* at 83:25-84:1. Mr. Fulmer was
 17 unaware—because he contends that it "wasn't relevant to what [he] was doing"—that the
 18 District's Board, and not its management, is responsible for setting the District's retail
 19 electricity rates, *id.* at 37:11-22, and also has "no idea how the SRP Board sets [its] rates
 20 and what all they consider." *Id.* at 63:8-13.

21 To form his opinion on the E-27 rate, Mr. Fulmer did not speak to any customers
 22 actually on the rate, nor did he look at any customer data "before and after" going on the E-
 23 27 rate. *Id.* at 84:2-85:13. He did not consult any studies about how residential customers
 24 respond to demand charges—including a readily available study analyzing the
 25 approximately 110,000 residential customers of APS who are on demand charges. *Id.* at
 26 130:9-13; 132:2-24; *see also* Ex. I (Meghan Grabel, Residential Demand Rates: APS Case
 27 Study (June 25, 2015) (concluding "Residential demand charges can be understood by
 28 residential customers").

1 Mr. Fulmer did rely on approximately six declarations from customers that SolarCity
 2 procured for him five days before his report was due, as well as on rooftop solar application
 3 data before and after E-27. Ex. C at 309:20-310:7; 314:13-315:8. The declarations Mr.
 4 Fulmer consulted were not from a statistically significant sample of customers. *Id.* at 86:2-
 5 20. *See also id.* at 313:9-314:12 (admitting he did not know the declarations chosen were
 6 from customers who were told that SolarCity would not install solar DG systems in the
 7 District's territory). And Mr. Fulmer is unaware of the "basis" of these declarants'
 8 opinions. *Id.* at 304:2-5. Mr. Fulmer relied on these declarations even though he has no
 9 idea whether these customers have personal biases—if they own stock in SolarCity, for
 10 example—or otherwise have some "hidden agenda." *Id.* at 312:2-15.

11 Mr. Fulmer conducted no analysis of the reasons for the decline in solar applications
 12 immediately after E-27 was announced, instead attributing the entire reason for the decline
 13 to the E-27 rate because he had a "hard time imagining other factors being as critical." *Id.*
 14 at 87:15-23. Mr. Fulmer also did not perform any empirical analysis of the E-27 rate or the
 15 response of District customers who are actually on the rate. *Id.* at 82:16-24; 87:15-23.

16 Mr. Fulmer then took his understanding of application data and "from that infer[red]
 17 that customers were having difficulty" with the E-27 rate. *Id.* at 302:18-303:6. Mr. Fulmer
 18 made this inference even though by definition if customers have not adopted the E-27 rate,
 19 they cannot reliably discuss its intricacies. Mr. Fulmer has no firsthand knowledge of any
 20 customer experience on the rate. *Id.* at 303:14-304:1. He also is unaware of whether
 21 customers are able to save money by installing rooftop solar systems on the E-27 rate,
 22 although he acknowledges that because customers continue to "adopt[] solar" in the
 23 District's service area, "there may be some folks who may be achieving savings or may be
 24 getting some value that way." *Id.* at 304:6-13.

25 ARGUMENT

26 In order to be admissible, opinion testimony under Federal Rule of Evidence 702
 27 must be relevant and reliable. *Daubert*, 509 U.S. at 597. SolarCity bears the burden of
 28 establishing that these pertinent admissibility requirements are satisfied. *General Elec. Co.*

1 *v. Joiner*, 522 U.S. 136, 144 (1997); *Domingo v. T.K. M.D.*, 289 F.3d 600, 606-07 (9th Cir.
 2 2002); *Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). Because Mr.
 3 Fulmer's opinions do not meet these requirements, he should not be permitted to provide
 4 testimony at trial.³

5 **I. MR. FULMER'S VALUE OF SOLAR OPINION IS INADMISSIBLE**

6 **A. Mr. Fulmer's Value of Solar Opinion Is Unreliable**

7 1. The Value of Solar Methodology Is Unreliable

8 Expert testimony must "rest[] on a reliable foundation." *Daubert*, 509 U.S. at 597.
 9 This requires the expert's reasoning or methodology to be scientifically valid. *Id.* at 592-93.
 10 In determining whether an expert's opinion is scientifically sound, the district court can
 11 consider (1) whether a scientific theory or technique can be (or has been) tested; (2) whether
 12 the theory or technique has been subjected to peer review and publication; (3) whether there
 13 is a known or potential error rate; and (4) whether the theory or technique is generally
 14 accepted in the relevant scientific community. *See id.* at 594-95; Fed. R. Evid. 702; Fed. R.
 15 Evid. 702 Advisory Committee's Note (2000). Each of these factors establish that a value
 16 of solar estimate lacks sufficient reliability to be admissible in a federal court.

17 First, value of solar estimates produce widely erratic results. For example, one value
 18 of solar estimate for APS arrived at a figure of 3.56 cents/kWh, while a solar-industry
 19 funded estimate for APS estimated the value at 23.7 cents/kWh. Ex. J at 5-6 (IREC, "A
 20 Regulator's Guidebook: Calculating the Benefits and Costs of Distributed Solar
 21 Generation," October 2013). Similarly, the RMI meta-study upon which Mr. Fulmer relied
 22 heavily, Fulmer Tr. 29:16-24, analyzed 16 different value of solar estimates and found a
 23 wide range of estimated values. Ex. B at 22. These differing outcomes primarily resulted
 24 from the "significant methodological gaps across studies, including (1) varying assumed
 25 cost and benefit categories; (2) varying approaches to calculating individual values; and (3)
 26

27 ³ In addition, Professors Kalt and Wolak should be precluded from relying on Mr. Fulmer's
 28 opinions in their testimony.

1 varying levels of analytical granularity.” Ex. B at 4-5. Mr. Fulmer acknowledged the
2 significant differences in different estimates, but merely shrugged them off. Ex. C at
3 116:13-20; 120:16-121:5. But there are no “standards controlling the technique’s
4 operation,” so it is impossible to assess the reliability of any particular estimate—including
5 Mr. Fulmer’s. *Daubert*, 509 U.S. at 594; *see also United States v. Cordoba*, 194 F.3d
6 1053,1061-62 (9th Cir. 1999) (holding that polygraph tests were unreliable because there
7 were no uniform standards regulating their application); *Almeciga v. Center for*
8 *Investigative Reporting, Inc.*, No. 15-cv-4319 (JSR), 2016 WL 2621131, at *11-14
9 (S.D.N.Y. May 6, 2016) (excluding handwriting analysis as unreliable because it had an
10 “unacceptable high” error rate and was “entirely lacking in controlling standards”).

11 Second, value of solar estimates are not “capable of empirical test.” *Daubert*, 509
12 U.S. at 593. Testing a methodology is critical to separate those theories that can be
13 confirmed as reliable from those that cannot. *See Bricklayers & Trowel Trades Int’l*
14 *Pension Fund v. Credit Suisse Sec. (USA) LLC*, 752 F.3d 82, 94 (1st Cir. 2014) (“Testing a
15 particular theory will either reproduce consistent results, thus confirming the theory, or
16 inconsistent results, thus casting doubt on it.”). Such testing is not an option here. This is
17 because value of solar estimates are premised entirely on future, *unknown* inputs. Ex. K at 5
18 (NREL, “Value of Solar: Program Design and Implementation Considerations,” March
19 2015). These future projections of value are speculative and inherently uncertain and are
20 therefore unreliable. *See, e.g., U.S. v. 10.092 Acres*, No. cv05-00363, 2007 WL 962846, at
21 *4 (D. Ariz. Mar. 27, 2007) (“Elements affecting value that depend upon events [that are]
22 not shown to be reasonably probable, should be excluded from consideration, for that would
23 be to allow mere speculation and conjecture to become a guide for the ascertainment of
24 value.”).

25 Further, because value of solar estimates have no tested or accepted methodology,
26 the decision about which elements to include or exclude are subject to the whims of the
27 estimator. For example, even though Mr. Fulmer acknowledged that the District did not
28 account for rooftop solar in its transmission planning, and that any potential transmission

1 value was dependent on a highly granular analysis that Mr. Fulmer did not perform, he still
 2 assigned a substantial value for avoided transmission costs. Ex. G at 19. Similarly, Mr.
 3 Fulmer assumed that the District would avoid substantial capacity costs from rooftop solar,
 4 even though the *earliest* the District would need additional capacity is 2022. *Id.* at 18.
 5 Then Mr. Fulmer simply guessed at the cost of a new power plant far into the future, which
 6 he claims rooftop solar might possibly obviate the need for. *Id.*

7 Mr. Fulmer attempts to explain away these and other flaws by pointing out that they
 8 are the best he can do with the data that he has and the still nascent nature of value of solar
 9 estimates. Ex. C at 227:14-21. While this statement is not true—other estimates have been
 10 far more comprehensive than Mr. Fulmer was here—it only proves the point: Value of solar
 11 estimates are not yet sufficiently reliable to be admissible in federal court. *See, e.g., Apple,*
 12 *Inc. v. Samsung Elecs Co., Ltd.*, No. 11-cv-01846, 2012 WL 2571332, at *6 (N.D. Cal. June
 13 30, 2012) (excluding testimony where calculations were not based “on a generally accepted,
 14 peer-reviewed method”). Because value of solar estimates are not based on “good grounds,
 15 based on what is known,” they are unsupported speculation that cannot be treated as the
 16 basis of a reliable methodology. *Daubert*, 509 U.S. at 590; *see also Ollier Sweetwater*
 17 *Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014) (holding that “speculative
 18 testimony is inherently unreliable”); *see also Bruno v. Bozzuto’s, Inc.*, 311 F.R.D. 124, 134
 19 (M.D. Pa. 2015) (excluding opinions where they were based entirely on “unverified
 20 projections”).

21 2. Even Assuming Value of Solar Is A Reliable Methodology, Mr.
 22 Fulmer Did Not Reliably Apply That Methodology to the Facts of This
 23 Case

24 An expert must not only employ a reliable methodology, but that methodology must
 25 be employed reliably to the facts of the case. Fed. R. Evid. 702(d). Mr. Fulmer has not
 26 done so. His opinion must therefore be excluded. *Kumho Tire Co.*, 526 U.S. at 152.

27 **First**, Mr. Fulmer, by his own admission, simply guesses at more than a quarter of
 28 his estimated value. Mr. Fulmer had no District-specific data or evidence to support these

1 estimates, so he “glanced” at other studies and made up a number. Ex. C at 236:15-18.
 2 And even though the vast majority of the studies Mr. Fulmer reviewed found no value (or
 3 even costs) associated with the categories Mr. Fulmer made up values for, he assigned a
 4 positive value because he didn’t “think” the value was zero. *Id.* at 261:20-262:14. But
 5 “[c]oming to a firm conclusion first and then doing research to support it is the antithesis of
 6 the [proper application of the scientific method under *Daubert*].” *In re Live Concert*
 7 *Antitrust Litig.*, 863 F. Supp. 2d 966, 988 (C.D. Cal. 2012) (internal citation omitted).

8 Mr. Fulmer also assigns nearly 10 percent of the value of rooftop solar to associated
 9 voltage support. Ex. G at 27-30. As Mr. Fulmer concedes, every other value of solar
 10 estimate that he is aware of found this value to be zero. Ex. C at 259:14-18. Mr. Fulmer’s
 11 only basis for his estimate of this “potentially real value,” *id.* at 258:19-25, was a pilot
 12 SolarCity recently conducted in Fresno, California, *id.* at 257:21-24, and a “quick review of
 13 the literature.” *Id.* at 259:1-13. But Mr. Fulmer admits that for this value to exist, rooftop
 14 solar installations must include smart inverters. *Id.* at 256:7-14. Mr. Fulmer admits that
 15 current smart inverter deployment in the District is “minimal,” *id.* at 256:15-22, and that he
 16 has no knowledge of whether any rooftop solar installer beyond SolarCity even has the
 17 capacity to install smart inverters. *Id.* at 256:23-257:4. Mr. Fulmer also testified that the
 18 existence of voltage support benefits depends on “some number of very specific electrical
 19 engineering factors,” *id.* at 257:25-258:7, and because he is not an electrical engineer, he
 20 has no “firsthand knowledge” of whether those benefits exist in the District’s service area.
 21 *Id.*

22 Under Ninth Circuit precedent, Mr. Fulmer’s failure to perform an “independent
 23 assessment of the validity” of data is itself grounds for exclusion. The court should exclude
 24 his opinion on the value of solar on this basis alone. *See, e.g., Magnetar Technologies Corp.*
 25 *v. Intamin Ltd.*, 801 F.3d 1150, 1159 (9th Cir. 2015) (holding that failure to independently
 26 verify data was grounds for exclusion); *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 (11th
 27 Cir. 2005) (excluding expert testimony because expert’s method of transposing data from
 28

1 other studies based on conjecture and rough approximation lacked the “intellectual rigor”
 2 required by *Daubert*).

3 **Second**, Mr. Fulmer failed to follow the few areas of industry-consensus best
 4 practices in conducting his analysis, which is itself grounds for exclusion. *See Kumho Tire*,
 5 526 U.S. at 157 (affirming exclusion of expert testimony as unreliable where there was no
 6 evidence that other experts within the industry utilized the expert’s particular methodology);
 7 *Daubert*, 509 U.S. at 594 (acceptance of methodology within the profession is “an
 8 important factor in ruling particular evidence admissible”). Because value of solar
 9 estimates are necessarily simplified and depend on a number of exogenous variables, Ex. C
 10 at 49:15-22; 51:9-15, an appropriate analysis would control for all variables that may affect
 11 the outcome. This requires performing a regression or sensitivity analysis. *Id.* at 53:5-11.
 12 *See, e.g., Raskin v. Wyatt Co.*, 125 F.3d 55, 67-68 (2d Cir. 1997) (excluding an economist’s
 13 report because the expert failed to control for factors that could have impacted his
 14 conclusions). Mr. Fulmer readily admits, however, that he neither controlled for any
 15 variables—he disclaimed any understanding of how he would do so—nor performed a
 16 sensitivity analysis.

17 In addition, there is widespread agreement—even from Mr. Fulmer—that most
 18 categories that go into a value of solar estimate depend on a granular, localized assessment
 19 of rooftop solar installations within a utility’s service area. Ex. C at 16:13-23; 115:25-
 20 116:5; 139:23-140:16; Ex. A at ¶ 138. Mr. Fulmer admittedly never performed that analysis,
 21 Ex. C at 140:17-22, nor is he qualified to do so. *Id.* at 25:7-26:11. Without examining this
 22 data, Mr. Fulmer cannot even determine whether there is a **positive** value of solar for most
 23 of the categories he considered, let alone values as high as he estimates. Indeed,
 24 independent studies of the value of solar have noted the possibility of **negative** values if the
 25 proper data is considered. *See* Ex. B at 12. Mr. Fulmer’s failure to use the correct data to
 26 perform his analysis renders his testimony unreliable. *See, e.g., Smith v. Pacific Bell Tel.*
 27 *Co.*, 649 F. Supp. 2d 1073, 1096 (E.D. Cal. 2009) (“Opinions derived from erroneous data
 28 are appropriately excluded.”); *Rogers v. Bonnett*, No. 5:04-cv-118, 2009 WL 2461820, at *5

(W.D. Tex. Aug. 11, 2009) (excluding conclusory expert opinion where opinion was “tainted by [the expert’s] use of incorrect facts”).

Third, and perhaps most importantly, Mr. Fulmer’s opinion skews heavily in favor of the benefits of rooftop solar. A value of solar estimate should subtract from the potential future benefits of rooftop solar its substantial costs. Mr. Fulmer, however, did not even consider many categories of costs, let alone attempt to quantify them. Ex. C at 162:6-24; 269:24-270:17; 285:9-22. These include costs associated with protection, voltage control, and ensuring the reliability on the circuits of individual parts of the distribution system, administrative costs associated with the administration of net metering and special billing for rooftop solar customers, and the costs associated with net metering participant bill savings that even SolarCity acknowledges exist. *Id.* Mr. Fulmer necessarily overstates the value of solar by not considering these additional costs, rendering his opinion unreliable and therefore inadmissible. *See, e.g., Saavedra v. Eli Lilly and Co.*, No. 2:12-civ-9366-SVW (MANx), 2014 WL 7338930, at *5 (C.D. Cal. Dec. 18, 2014) (“By looking only to consumer demand while ignoring supply, Dr. Hay’s method of computing damages converts the lost-expectation theory from an objective evaluation on relative fair market values to a seemingly subjective inquiry of what an average consumer wants.”); *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1154 (D. Wash. 2009) (“[A]ny step that renders the expert’s analysis unreliable renders the expert’s testimony inadmissible.”).

The only costs Mr. Fulmer does consider are integration costs. Even here, he understates the true costs of solar to the District. Mr. Fulmer admits that he did not commission a “specific engineering study” even though one is required in “[d]eriving [integration] costs.” Ex. G at 38; Ex. C at 266:6-17. Second, as he did in calculating the benefits of solar, he calculates the integration costs of solar using speculative data not relevant to the District. Instead, he relied exclusively on a different study for a different utility. Without explanation, he concludes that the District’s integration costs are the same. Such guesswork may satisfy Mr. Fulmer, but a court cannot “simply take[] the expert’s word for it.” Fed. R. Evid. 702 Advisory Committee’s Note (2000); *see also Goebel v.*

1 *Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1088 (10th Cir. 2000) (“It is axiomatic that
2 an expert, no matter how good his credentials, is not permitted to speculate.”).

3 3. Mr. Fulmer Is Not Qualified to Perform A Value of Solar Analysis

4 An expert must be qualified to render the opinion offered. *See In re Apollo Group*
5 *Inc. Securities Litigation*, 527 F. Supp. 2d 957, 960 (D. Ariz. 2007). Mr. Fulmer is not
6 sufficiently qualified to perform the estimate he intends to offer. The Court must exclude
7 an expert’s testimony unless the expert offers “some special knowledge, skill, experience,
8 training, or education on the subject matter” of the case. *U.S. v. Hankey*, 203 F.3d 1160,
9 1168 (9th Cir. 2000).

10 Mr. Fulmer has only conducted one other value of solar estimate and one “high
11 level” review in his career. Ex. C at 27:12-19. Mr. Fulmer has never published any
12 independent research on the value of solar, nor has his present methodology been subjected
13 to peer review. *Id.* at 28:3-8. He has never studied the value of solar outside an adversarial
14 context, and has never performed a value of solar estimate not funded by the solar industry.
15 *Id.* at 27:12-23. If the expert’s testimony is not borne out of independent research, then he
16 must provide “proof that the research and analysis supporting the proffered conclusions
17 have been subjected to normal scientific scrutiny through peer review and publication.”
18 *Clausen v. M/V NEW CARISSA*, 339 F.3d 1049, 1056 (9th Cir. 2003).

19 Mr. Fulmer cannot do so. Mr. Fulmer simply glanced at other estimates, most of
20 which were funded by the rooftop solar industry, and offers no basis to believe that any
21 “analysis” performed had been subject to the type of intellectual rigor required. And in
22 several instances, Mr. Fulmer admits that he would have had “to hire” someone else to
23 derive reliable figures. That never stopped him from plowing ahead with his own guesses
24 anyway, Ex. C at 266:22-268:22, which always resulted in more favorable outcomes for his
25 client.

26 **B. Mr. Fulmer’s Value of Solar Opinion Is Not Relevant**

27

28

Expert testimony must be relevant “to the task at hand.” *Daubert*, 509 U.S. at 597. This means the expert’s opinion must “assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 591.

The potential estimated value of solar as a generating asset to the District is not an issue in this case. SolarCity challenges the District’s retail electric rates set pursuant to a ratemaking process. FAC ¶¶ 4, 89-104 (Dkt. 39). Mr. Fulmer testified that utility ratemaking seeks to recover already incurred costs. Ex. C at 49:4-9; 163:3-6. Utilities do not set their prices based on future costs they hope to avoid. Yet, that is exactly what Mr. Fulmer’s opinion requires. The District may or may not obtain future value from rooftop solar installations in its service area, but that future value was not and cannot be an element of how the District sets its prices today. Ex. A at ¶ 106.

Further, Mr. Fulmer does not opine that the District’s E-27 rate would have been any different if a value of solar analysis had been considered. Ex. C at 163:7-24. He also cannot point to a single other utility that employs value of solar estimates in determining the structure of retail net metering. *Id.* at 14:1-8. Mr. Fulmer’s opinion on the value of solar is therefore not useful to this Court and should be excluded.

II. MR. FULMER’S DEMAND CHARGE OPINION LACKS SUFFICIENT RIGOR

Mr. Fulmer simply did not do enough work to provide a reliable or relevant opinion regarding the demand charge component of the District’s rate. Mr. Fulmer may sincerely believe that the demand charge is complex, but his personal opinion will not assist this Court at trial.

Mr. Fulmer did not perform any empirical analysis. He did not speak to any customers on the E-27 rate. He did not review any data regarding customer behavior. He reviewed no studies of customer behavior on residential demand charges. And he certainly did not conduct a study of his own.

Instead, Mr. Fulmer looked at only two categories of evidence that are plainly insufficient to support his opinion here. First, Mr. Fulmer considered a half-dozen customer

1 declarations. Six people out of the nearly one million District customers is clearly not
 2 statistically significant. Mr. Fulmer even concedes that each customer actually on E-27
 3 might have a different opinion about the rate. Ex. C at 105:4-14.

4 In addition, Mr. Fulmer considered the decline in applications immediately after E-
 5 27 was announced (although he never even looked at data in 2016). But Mr. Fulmer never
 6 did any work to determine what the causes of that decline were. As Professor Katz explains
 7 in his report, several factors explain this decline, Ex. L at ¶¶ 248-249 (Expert Report of
 8 Michael L. Katz, July 1, 2016), and it would be improper to simply assume that the E-27
 9 rate is the sole or even the primary cause of the decline. *Id.* Yet, Mr. Fulmer simply offers
 10 his own *ipse dixit* that the decline in applications confirms his opinion. This is
 11 impermissible opinion testimony and should be excluded. *Joiner*, 522 U.S. at 146; *Building*
 12 *Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1154 (9th Cir.
 13 2012) (holding that the district court did not abuse its discretion in rejecting the declaration
 14 of an expert who “offered unsupported assertions” with “no data forming the basis for [the
 15 expert's] assumptions or conclusions”).

16 Mr. Fulmer also failed to consider evidence that would contradict his hypothesis. As
 17 Mr. Fulmer testified, he did not look to see if there was any evidence in the record that
 18 might conflict with his opinion. Ex. C at 88:20-89:12. Instead, he simply performed word
 19 searches in deposition transcripts for snippets that supported his views. *Id.* at 294:7-18. *See*
 20 *In re Zoloft (Sertraline Hydrochloride) Prod. Liab. Litig.*, 26 F. Supp. 339, 460-61 (E.D. Pa.
 21 2014) (“The court finds that the expert report prepared by Dr. Berard does selectively
 22 discuss studies most supportive of her conclusions, as Dr. Berard admitted in her deposition,
 23 and fails to account for contrary evidence[.]”). “But experts cannot simply ignore
 24 contradictory evidence; they are not allowed to pick and choose facts they find helpful and
 25 to pretend that the others do not exist.” *Zeolla v. Ford Motor Co.*, No. 09-40106-FDS, 2013
 26 WL 308968, at *9 (D. Mass. 2013). [REDACTED]
 27 [REDACTED]
 28 [REDACTED], Ex. M at 172:1-25;

1 203:21-204:6 (30(b)(6) Videotaped Deposition of Sun Valley Solar Solutions, by and
2 through Russell Patzer, May 2, 2016), [REDACTED]

3 [REDACTED] His opinion
4 should be excluded on this basis alone.

5
6 Dated: September 15, 2016

Respectfully Submitted,

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5 **CERTIFICATE OF SERVICE**

6 I hereby certify that on September 15, 2016, I electronically transmitted the attached
7 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
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/s/ [DRAFT]